

Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule

Region 9 RTOC

Office of Water & Region 9 Wetlands Section
U.S. Environmental Protection Agency

July 28, 2022

Today's Agenda

- Introduction
- Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule
 - Presentation
 - Questions and Answers
- Planning Discussion – 401 Workshop or Training
- Closing Remarks and Next Steps

Background: What is Clean Water Act (CWA) section 401?

- Under CWA Section 401:
 - A federal agency may **not** issue a license or permit to conduct any activity that may result in any discharge into a “water of the United States”, **unless** the state or authorized tribe where the discharge would originate either issues a CWA Section 401 water quality certification or waives certification.
- Section 401 applies to **any** federal license or permit that may result in a discharge into a water of the United States.

Background: Who is involved in CWA section 401 certification?

- **Project proponent:** applicant for a federal license or permit or the entity seeking certification
- **Federal licensing or permitting agency:** any agency of the Federal Government to which application is made for a license or permit that is subject to CWA section 401
- **Certifying authority:** a state or authorized tribe where the discharge originates
 - **State:** states and territories
 - **Authorized tribes:** tribes with “treatment in a similar manner as a state” for section 401
 - **EPA** acts as the certifying authority if no authorized tribe or state

Background: Previous Agency Actions on CWA Section 401

- EPA promulgated regulations for water quality certification in **1971**, prior to the CWA, which created section 401.
- On **July 13, 2020**, the “Clean Water Act Section 401 Certification Rule” (“2020 Rule”) was published. This rule went into effect on September 11, 2020.

Background: Executive Order 13990

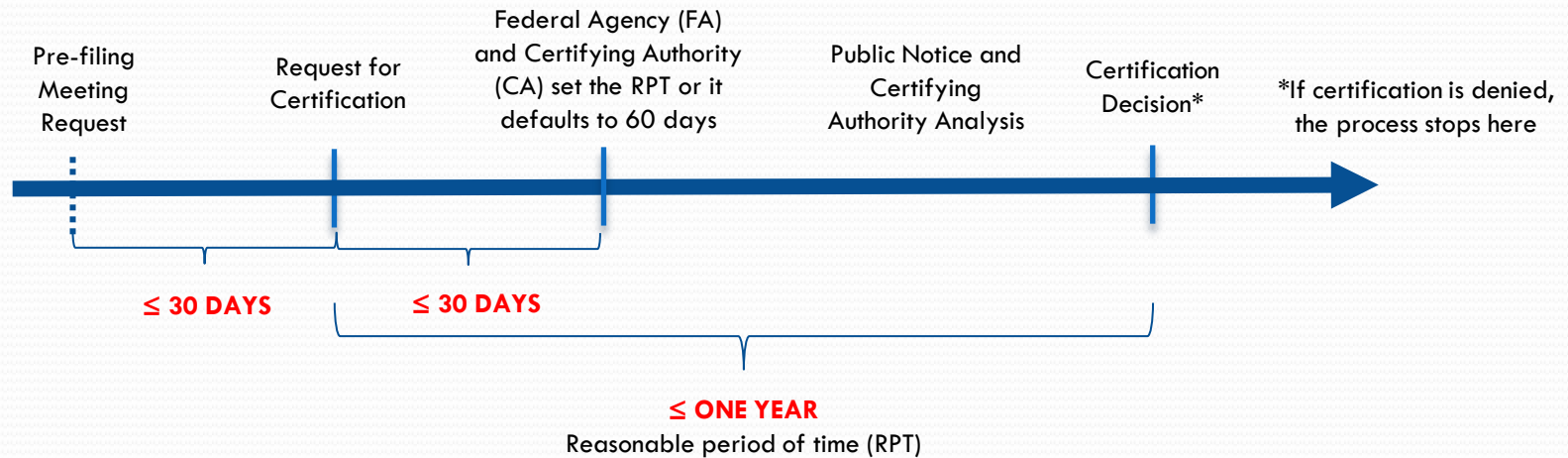
- On **January 20, 2021**, President Biden issued Executive Order 13990, “*Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*,” which directed EPA to review and consider revising the CWA section 401 certification regulations.
- On **May 27, 2021**, Administrator Regan signed a *Federal Register* notice announcing EPA’s intention to reconsider and revise the CWA Section 401 Certification Rule found at 40 CFR 121.

Proposed CWA Section 401 Water Quality Certification Improvement Rule

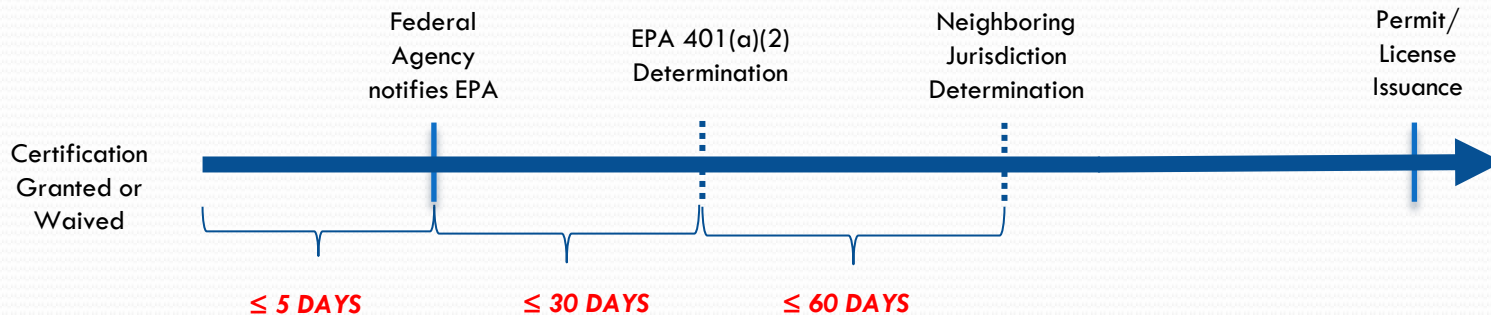
- On **June 1, 2022**, Administrator Regan signed the proposed “Clean Water Act Section 401 Water Quality Certification Improvement” rule to modernize and clarify EPA’s existing regulations at 40 CFR 121 and 40 CFR 124.53-55.

Proposed rule: Overview

Certification Process



Post-Certification Process



Key features of the proposal

- Request for certification
- Reasonable period of time
- Scope of certification
- Federal agency review
- Neighboring jurisdictions
- Treatment in a similar manner as a state (TAS)

Proposed Rule: Request for certification

- All **requests for certification** must:
 - Be in writing, signed, and dated;
 - Include a copy of the draft license or permit (unless legally precluded from obtaining a copy); and
 - Include any existing and readily available data or information related to potential water quality impacts from the proposed project
- Defines additional requirements when EPA is the certifying authority (or when state/tribes do not define additional requirements in regulations).
- States/tribes may define other necessary elements for a request for certification in their regulations.

Proposed Rule: Reasonable period of time

- A certifying authority must act on a request for certification within the RPT, as determined by the federal licensing or permitting agency and certifying authority within 30 days of receiving a certification request.
 - The RPT shall not exceed one year.
 - *If they fail to set an RPT*, it will default to 60 days from the receipt of a request for certification.
- Two ways the RPT may be extended:
 - **Automatically extended** in two scenarios upon written notification by the certifying authority before the end of the RPT:
 - (1) need to meet certifying authority public notice requirements or
 - (2) force majeure events, *e.g.* natural disaster.
 - **Extended upon agreement** between the certifying authority and federal agency, after consulting with the project proponent, as long as it does not exceed one year from receipt of the certification request.

Proposed Rule: Scope of certification

- The scope of a certifying authority's review is whether the *activity as a whole* will comply with water quality requirements.
 - “Water quality requirements” means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, and federal and state or tribal laws or regulations implementing those sections, and *any other water quality-related requirement of state or tribal law*.
- Section 401 certifications are limited to addressing potential **water quality effects** from federally licensed or permitted projects.

Proposed Rule: Federal agency review

- Federal agency review is limited to reviewing a certification decision for compliance with **four facial requirements from section 401**:
 - (1) whether the decision indicates whether it is a grant, grant with conditions, denial, or express waiver;
 - (2) whether the proper certifying authority issued the decision;
 - (3) whether the certifying authority provided the appropriate public notice; and
 - (4) whether the decision was issued within the RPT.
- Consequences of federal agency review:
 - **Failure to indicate decision or provide appropriate public notice**: the federal agency must provide an opportunity to remedy the deficiency, and if necessary, extend the RPT to provide such an opportunity (provided the extension would not exceed one year from receipt of the certification request)
 - **Failure to have proper certifying authority issued the decision**: federal agency must notify project proponent that it must seek notification from the proper certifying authority
 - **Failure to issue decision within the RPT**: a waiver may occur

Proposed Rule: Neighboring jurisdiction

- The federal agency must notify EPA **within 5 days** of receiving the license or permit application and related certification or waiver.
- Clarifies that **EPA must determine** whether a discharge “may affect” water quality in a neighboring state or authorized tribe.
- Requires the neighboring jurisdiction to notify EPA, the federal agency, and the certifying authority if it objects to the issuance of the federal license or permit and **defines the contents of its notification**.
- Requires the federal agency to provide public notice **at least 30 days prior to the hearing** and requires EPA to provide its evaluation and recommendations at the hearing.

Proposed rule: Treatment in a similar manner as a state (TAS) for Section 401

- A tribe may obtain TAS for section 401 **without obtaining TAS for water quality standards.**
- A tribe may also obtain TAS **solely for section 401(a)(2)** to participate as a neighboring jurisdiction.



Questions/Discussion

Fall 2022 401 Training/Workshop

- In-person training or workshop
- Looking for tribal CA co-presenters/co-teachers
- Possible 401 topics?
 - History of the Clean Water Act and 401
 - Establishing a 401 Certification Program
 - Certification Actions / Writing 401 Certifications
 - Neighboring Jurisdiction Water Quality Determinations
- Other Water Quality topics?
 - TAS Process
 - Development of Water Quality Standards

Additional Resources

- The proposed CWA Section 401 Water Quality Certification Improvement Rule text can be found here: www.epa.gov/cwa-401/proposed-clean-water-act-section-401-water-quality-certification-improvement-rule
 - Fact Sheet – in English and Spanish
 - Rule Provision Comparison Table from the Economic Analysis
 - Recorded Webinar – Overview of the Proposed Rule
 - Listening Session Slides and Discussion Questions

Tribal consultation

- The Agency held a pre-proposal tribal consultation and coordination period from June 7, 2021 to September 7, 2021.
- EPA is continuing to consult with individual tribes, upon request and as time and resources permit.
 - **If you are interested in requesting consultation on the proposed rule, please e-mail cwa401@epa.gov.**

Additional Information

- Visit www.regulations.gov to view the docket for this rulemaking, identified by **Docket ID No. EPA-HQ-OW-2022-0128**.
 - Comments may be submitted to the Docket until **August 8, 2022** (60-day period).
- For more information on CWA section 401 and this rulemaking, please visit www.epa.gov/CWA-401.
- If you have any questions, please send an e-mail to cwa401@epa.gov.

Region 9 401 Contacts and Information

- Region 9 Water Quality Certifications on Tribal Lands of the Pacific Southwest
 - <https://www.epa.gov/tribal-pacific-sw/epas-water-quality-certifications-tribal-lands-pacific-southwest>
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